



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1998

Mr. John Steiner
Division Chief
City of Austin
Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR98-1066

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114351.

The City of Austin (the "city") received three requests for information relating to proposals submitted for RFP #VC97300015. You state that some of the requested information has been released. However, you claim that certain portions of the requested proposals may be proprietary in nature and protected from disclosure by the Government Code. Gov't Code § 552.007; Gov't Code § 552.305. You raise no exception to disclosure on behalf of the city, and make no arguments regarding the proprietary nature of the requested information. You have submitted copies of the proposals for our review.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, enable, ORCOM Systems, SPL World Group, Utiligent, and JMC Consultants were notified of the requests. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

Three of the companies did not respond to our notice; therefore, we have no basis to conclude that any portion of their proposals is excepted from disclosure. *See* Open Records

regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* After reviewing its arguments and the submitted documents, we conclude that Utiligent has established that sections 2 and 3 and Attachments A and B of its proposal are protected under section 552.110

On the other hand, *en-able* has made only unsubstantiated, conclusory statements regarding the confidentiality of its proposal. See Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret). We, therefore, conclude that *en-able* has not met its burden under section 552.110. Accordingly, the city must release *en-able*'s proposal in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. Therefore, the city must release the proposals of ORCOM Systems, SPL World Group, and JMC Consultants in their entirety.

Both en·able and Utiligent argue that section 552.104 of the Government Code excepts certain portions of their proposals from disclosure. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. The city has not argued that release of the requested information would harm a particular competitive situation. In fact, it appears that the contract has already been awarded. Therefore, the requested information may not be withheld under section 552.104.

Finally, both Utiligent and en·able argue that portions of their proposals are protected under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

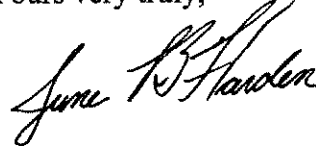
The Texas Supreme Court has adopted the definition of "trade secret" from the *Restatement of Torts*, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/gle

Ref.: ID# 114351

Enclosures: Submitted documents

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